APPLICATION OF THE PRINCIPLE OF INTERNATIONAL ARBITRATION ON THE AMERICAN CONTINENTS

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According to present practice, the redress of national grievances may be pursued, first, by amicable methods; and, secondly, by force. Of amicable methods the most common is negotiation. There is nothing more conducive to the settlement of differences than a fair and candid discussion of them. Where this fails, we may yet try arbitration or mediation.

These methods are often discussed as if they were practically the same, but in reality they are fundamentally different. Mediation is an advisory, arbitration a judicial, function. Mediation recommends, arbitration decides. While nations might for this reason accept mediation in various cases in which they might be unwilling or reluctant to arbitrate, it is also true that they have often settled by arbitration questions which mediation could not have adjusted.

It is, for example, hardly conceivable that the question of the Alabama claims could have been settled by mediation. The same thing may be said of many and indeed of most of the great number of boundary disputes that have been settled by arbitration. The importance of mediation as a form of amicable negotiation should not be minimized. The Congress of Paris of 1856, as well as the Congo Conference of 1884, made a declaration in favor of the practice of mediation; and a formal plan of mediation forms part of the convention lately adopted at The Hague for the settlement of international disputes. Nevertheless, mediation is merely a diplomatic function and offers nothing new.

Arbitration, on the contrary, represents a principle as yet only occasionally acted upon, namely, the application of law and of judicial methods to the determination of disputes between nations. Its object is to displace war between nations as a means of obtaining national redress, by the judgments of international judicial tribunals;

just as private war between individuals, as a means of obtaining personal redress, has, in consequence of the development of law and order in civilized states, been supplanted by the processes of municipal courts.

In discussing the subject of arbitration we are therefore to exclude from consideration, except as a means to that end, mediation, good offices or other forms of negotiation. Our present subject—the application of the principle of international arbitration on the American continents—may be discussed in two aspects: (1) That of efforts to establish the general principle of arbitration, and (2) that of the actual trials of the principle.

One of the declared objects of the Panama Congress of 1826 was to promote the peace and union of American nations, and to establish amicable methods for the settlement of disputes between them; but, as is well known, the congress failed to accomplish this design. The project, however, was not wholly abandoned. It appealed too strongly to the imagination to be readily forgotten; and in 1831 Mexico revived it, by proposing a conference of American republics for the purpose of bringing about not only a union and close alliance for defence, but also the acceptance of "friendly mediation" for the settlement of disputes between them, and the framing and promulgation of a code of public law to regulate their mutual relations. This was not a proposal of a scheme of arbitration; but it may be observed that the adoption of a code of public law to govern the relations of nations would remove one of the greatest obstacles to the successful operation of a permanent tribunal for the decision of international differences.

In 1847 there assembled at Lima a congress composed of representatives of Bolivia, Chile, Ecuador, New Granada and Peru. The avowed object of this meeting was the formation of an alliance of American republics for the purpose of "maintaining their independence, sovereignty, dignity and territorial integrity, and of entering into such other compacts as might be conducive to their common welfare." At the first session of the congress it was decided to extend an invitation to the United States; but it is altogether probable that this resolution was taken with a view to bring to the attention of the United States the object of the conference, rather than with any hope that the invitation would be accepted. In reality the United States was then at war with Mexico, and was not in a

position to lend the weight of its influence to the preservation of the principle of territorial integrity. For a number of years after the Congress of 1847, efforts for union among American nations seem to have been confined to the Spanish-American republics, and in no small measure to have been inspired by a feeling of apprehension towards the United States, excited not only by the Mexican War, but also by filibustering expeditions, such as those of William Walker, against Mexico and the states of Central America. This feeling led to the making of the "Continental Treaty" of 1856 between Chile, Ecuador and Peru.

January 11, 1864, the Peruvian government invited the Spanish nations of America to take part in another congress at Lima, with a view to "organize into one family" the several republics of Spanish origin. Among the particular subjects specified for the consideration of the proposed congress was the adoption of measures which should lead to the amicable settlement of boundary disputes, which were declared to be in nearly all the American states the cause of international quarrels, of animosities, and even of wars as disastrous to the honor as to the prosperity of the nations concerned; and to this was added the explicit proposal "irrevocably to abolish war, superseding it by arbitration, as the only means of compromising all misunderstandings and causes for disagreement between any of the South-American republics." The congress met at Lima, November 14, 1864, the anniversary of the birth of Bolivar. Representatives were present from the Argentine Republic, Bolivia, Chile, Colombia, Ecuador, Guatemala, Peru and Venezuela.

September 3, 1880, a convention was signed at Bogota between the governments of Chile and Colombia, by which the two republics bound themselves "in perpetuity to submit to arbitration, whenever they cannot be settled through diplomatic channels, all controversies and difficulties, of whatever nature, that may arise between the two nations." It was also stipulated that the contracting parties should endeavor, at the earliest opportunity, to conclude similar conventions with other American nations, "to the end that the settlement by arbitration of each and every international controversy should become a principle of American public law." On the strength of the signature of this convention, the Colombian minister of foreign relations, October 11, 1880, extended to the governments of America an invitation to appoint representatives to meet at Panama with full

powers to give to the convention full international effect. This invitation was necessarily rendered nugatory by the continuance of the Chile-Peruvian war. November 29, 1881, however, Mr. Blaine, as secretary of state of the United States, extended, in the name of the President, an invitation to all the independent countries of North and South America to participate in a general congress to be held in Washington on the twenty-fourth of November, 1882, "for the purpose of considering and discussing methods of preventing war between the nations of America." Mr. Blaine added that the President desired that the attention of the congress should be "strictly confined to this one great object." On the ninth of August, 1882, Mr. Frelinghuysen, Mr. Blaine's successor, gave notice that the President was constrained to postpone the projected meeting till some future day. As one of the grounds for this action he stated that the peaceful condition of the South-American republics, which was contemplated as essential to a profitable and harmonious assembling of the congress, did not exist. The original proposal, however, was never entirely relinquished; and on May 28, 1888, the President gave his approval to the act under which was convoked the International American Conference of 1889-1890. Of this conference one of the results was the celebrated plan of arbitration adopted April 18, 1890. By this plan it was declared that arbitration, as a means of settling disputes between American republics, was adopted "as a principle of American international law"; that arbitration should be obligatory in all controversies concerning diplomatic and consular privileges, boundaries, territories, indemnities, the right of navigation and the validity, construction and enforcement of treaties; and that it should be equally obligatory in all other cases, whatever might be their origin, nature or object, with the sole exception of those which, in the judgment of one of the nations involved in the controversy, might imperil its independence; but that, even in this case, while arbitration for that nation should be optional, it should be "obligatory upon the adversary power." As yet this plan represents but an aspiration, since it failed to receive the approval of the governments whose representatives adopted it.

In connection with the plan just described, it is essential to recall the deliberations of the conference on the subject of conquest, which bore, in its final disposition, a vital relation to the plan of arbitration. The delegates of the Argentine Republic and Brazil offered,

January 15, 1890, a series of resolutions, the eighth article of which reads as follows: "Acts of conquest, whether the object or the consequence of the war, shall be considered to be in violation of the public law of America."

The resolutions were referred to the committee on general welfare, which, April 18, 1890, recommended the adoption of the following declarations:

"1. That the principle of conquest shall never hereafter be recognized as admissible under American public law.

"2. That all cessions of territory made subsequent to the present declaration shall be absolutely void if made under threats of war or the presence of an armed force.

"3. Any nation from which such cessions shall have been exacted may always demand that the question of the validity of the cessions so made shall be submitted to arbitration.

"4. Any renunciation of the right to have recourse to arbitration shall be null and void whatever the time, circumstances, and conditions under which such renunciation shall have been made."

These declarations were subscribed by three members of the committee respectively representing the Argentine Republic, Bolivia and Venezuela. Three other members representing Colombia, Brazil and Guatemala stated that they adopted only the first of the declarations.

Mr. Varas, a delegate from Chile, stated that the delegation from that country would abstain from voting or taking part in the debate on the resolutions.

Mr. Henderson, a delegate from the United States, offered, as expressing the views of the United States delegation, the following resolution:

"WHEREAS, In the opinion of this conference, wars waged in the spirit of aggression or for the purpose of conquest should receive the condemnation of the civilized world; therefore

"*Resolved,* That if any one of the nations signing the treaty of arbitration proposed by the conference, shall wrongfully and in disregard of the provisions of said treaty, prosecute war against another party thereto, such nation shall have no right to seize or hold property by way of conquest from its adversary."

After a long discussion, in which the delegate from Peru supported the recommendation of the committee as a whole, the report

was adopted by a majority of 15 to 1. The delegations voting affirmatively were Hayti, Nicaragua, Peru, Guatemala, Colombia, Argentine Republic, Costa Rica, Paraguay, Brazil, Honduras, Mexico, Bolivia, Venezuela, Salvador and Ecuador. The United States voted in the negative while Chile abstained from voting.

Further discussion then took place, after which a recess was held in order that an agreement might be arrived at which would secure the vote of the United States delegation. On the session being resumed, Mr. Blaine presented the following plan:

"1. That the principle of conquest shall not, during the continuance of the treaty of arbitration, be recognized as admissible under American public law.

"2. That all cessions of territory made during the continuance of the treaty of arbitration shall be void if made under threats of war or the presence of an armed force.

"3. Any nation from which such cessions shall be exacted may demand that the validity of the cessions so made shall be submitted to arbitration.

"4. Any renunciation of the right to arbitration made under the conditions named in the second section shall be null and void."

The conference unanimously agreed to accept this as a substitute for the former report, Chile abstaining from voting. But, as the plan of arbitration never became effective, the declaration against conquest, which was made an integral part of it, can now be cited only as an expression of opinion.

In the Second International Conference of American States, which was held at the city of Mexico from October 22, 1901, to January 31, 1902, the subject of arbitration was much discussed. There appeared to be a unanimous sentiment in favor of "arbitrations as a principle," but a great contrariety of opinion as to the extent to which the principle should be carried. On this question three views were supported in the conference:

"1. Obligatory arbitration, covering all questions pending or future, when they did not affect either the independence or national honor of a country;

"2. Obligatory arbitration, covering future questions only and defining what questions shall constitute those to be excepted from arbitration; and

"3. Facultative or voluntary arbitration, as best expressed by The Hague convention."

The delegation of the United States advocated the signing of a protocol affirming the convention for the pacific settlement of inter-

national disputes, signed at The Hague, July 29, 1899, as the best practicable plan for securing unanimity of action and beneficial results.

A plan was finally adopted in the nature of a compromise. A protocol looking to adhesion to The Hague convention was signed by all the delegations except those of Chile and Ecuador, who are said, however, afterwards to have accepted it in open conference. By this protocol authority was conferred on the governments of the United States and Mexico, the only American signatories of The Hague convention, to negotiate with the other signatory powers for the adherence thereto of other American nations so requesting. Besides, the President of Mexico was requested to ascertain the views of the different governments represented in the conference regarding the most advanced form in which a general arbitration convention could be drawn up that would meet the approval and secure the ratification of all the countries in the conference, and afterwards to prepare a plan for such a general treaty and if possible to arrange for a series of protocols to carry it into effect; or, if this should be found to be impracticable, then to present the correspondence with a report to the next conference.

A project of a treaty of compulsory arbitration was signed by the delegations of the Argentine Republic, Bolivia, Santo Domingo, Salvador, Guatemala, Mexico, Paraguay, Peru, Uruguay and Venezuela.

Besides the protocol and project of treaty above referred to, a project of treaty was adopted covering the arbitration of pecuniary claims. This project was signed by the delegations of all the countries represented in the conference. Under it the several republics obligated themselves for a period of five years to submit to the court at The Hague all claims for pecuniary loss or damage which might be presented by their respective citizens, and which could not be amicably adjusted through diplomatic channels, when such claims were of sufficient importance to warrant the expense of arbitration. Should both parties prefer it, a special jurisdiction might be organized according to Article xxi of The Hague convention. By Article v the project is to be binding on the states ratifying it from the date on which five of the signatories have so ratified it.

Such have been the efforts on the part of American nations to concert among themselves a plan for the settlement of their dif-

ferences by arbitration. The fact that these efforts have not yet resulted in the effective establishment of a definite and permanent system, to which all American nations may look with confidence, as a sure and ready means of avoiding armed conflicts, is due, not to any lack of serious purpose, but to the inherent difficulties of the task. The American nations, though they have felt a common impulse to act together in safeguarding their independence against attacks from other quarters, have not been unconscious of the existence among themselves of strong diversities of interest and of ambition. To these diversities are to be ascribed some of the conflicts that have marked their history during the past eighty years. Another fruitful source of strife has been the unsettled condition that has often prevailed in their internal politics. A slight familiarity with history suffices to show that the preservation of international peace is to a great extent dependent upon the preservation of domestic peace. Civil disturbances not only produce exceptional measures, which in turn give rise to complaints and claims, but they render uncertain the performance of international engagements and sometimes necessitate the readjustment of international relations. Against difficulties such as these American statesmen and diplomatists, in endeavoring to establish a system of arbitration, have been obliged to contend; and if their highest aspirations yet remain to be fulfilled, they have at least promulgated an ideal and projected it into the domain of practical statesmanship.

Turning from plans for the establishment of a general system, to the consideration of the cases in which the principle of arbitration has actually been employed, we find that there were during the past century eighty-four international arbitrations to which an American nation was a party. In forty, or nearly one-half, of these the other party was a European power, the arbitration between American nations being forty-four. To about two-thirds of these the United States was a party, the number of arbitrations between other American powers being fourteen. Of this number, there were ten that related to questions of boundary. In respect of such questions, one of the objects of the Lima conference of 1864 may therefore be said to have been in a measure attained. It is proper, however, to point out that in the settlement of boundary disputes by arbitration, there is nothing distinctively American. The same method has repeatedly been employed by European powers, both in Europe and elsewhere,

for the termination of similar controversies. Indeed, we should not forget that, while others were discussing arbitration, it remained for a European ruler to take the initiative in the movement that resulted in the actual establishment of the first general and permanent plan for the peaceful settlement of international disputes. On the other hand, the first powers to resort to The Hague Tribunal were two American nations, the United States and Mexico. From these premises, the logical inference seems to be that in looking forward, as we reasonably may, to a yet wider application of the principle of arbitration by American nations, we should base our expectations not more upon distinctively local movements, than upon a more general tendency throughout the civilized world to employ judicial methods for the decision of international questions.

When we consider the future of international arbitration, whether in America or elsewhere, we are at once confronted with the question as to its limitations. Is it possible to fix any precise bounds, beyond which this mode of settling international disputes may be said to be impracticable? If we consult the history of arbitrations during the past hundred years, we are obliged to answer that no such lines can be definitely drawn; but this is far from saying that the use of force in the conduct of international affairs is likely soon to be abolished. It signifies merely that phrases such as "national honor" and "national self-defence," which have been employed in describing supposed exceptions to the principle of arbitration, convey no definitive meaning. Questions of honor and of self-defence are, in international as in private relations, matters partly of circumstance and partly of opinion. When the United States, in 1863, first proposed that the differences that had arisen with Great Britain, as to the fitting out of the *Alabama* and other Confederate cruisers, should be submitted to arbitration, Earl Russell rejected the overture on the ground that the questions in controversy involved the national honor, of which Her Majesty's government were declared to be "the sole guardians." Eight years later there was concluded at Washington the treaty under which the differences between the two governments were submitted to the judgment of the tribunal that met at Geneva. This remarkable example serves to illustrate the fact that the scope and progress of arbitration will depend, not so much upon special devices, or upon general declarations or descriptive exceptions, as upon the dispositions of

nations, dispositions which, although they are subject to the modifying influence of public opinion, spring primarily from the national feelings, the national interests and the national ambitions. Of the existence of favorable dispositions, the usual and appropriate evidences are: (1) the actual resort to arbitration; (2) the loyal acceptance of its results, and (3) the faithful performance of the award—the three essential conditions of the success of any arbitral plan.